

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2
3 Appeal of Due Process Level I Decision

No. 01F-II0004-ADE

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**DECISION AND ORDER OF
ADMINISTRATIVE LAW JUDGE**

5 Appellant,

6
7 -V-

8 SCOTTSDALE UNIFIED SCHOOL
9 DISTRICT,

10 Appellee.

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14 This is a final administrative appeal brought by Appellant --- ("Student"), by and
15 through his mother, A.L. ("Parent"), for review of a Due Process Hearing Officer's
16 Decision concluding, *inter alia*, that Parent is not entitled to receive reimbursement from
17 Appellee Scottsdale Unified School District (the "District") for tuition and transportation
18 costs associated with Parent's unilateral placement of Student at a private school.
19 Pursuant to A.R.S. §§ 41-1092.01(E) and 41-1092.02, the Arizona Department of
20 Education referred this matter to the Office of Administrative Hearings for final
21 administrative hearing appeal as provided in Arizona Administrative Code ("A.A.C.") R7-
22 2-405(J).

23 The law governing these proceedings is the Individuals with Disabilities
24 Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* (as re-authorized and amended in
25 1997), and its implementing regulations, 34 C.F.R. Part 300, as well as the Arizona
26 Special Education statutes, A.R.S. § 15-761 *et seq.*, and its implementing rules, A.A.C.
27 R7-2-401 through R7-2-408.

28 Parent represented Student in these proceedings. Robert D. Haws, Esq. of
29 Jennings, Strouss & Salmon, P.L.C. represented the District.

30 Parent initiated the due process procedure from which this appeal arises by filing
with the District, on August 14, 2000, a request for due process. In that request, Parent
identified three issues requiring resolution:

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1. Whether Parent was entitled to reimbursement of registration fees for Student's extended school year (ESY) programs in 1999 and 2000 at a private school;
2. Whether the District failed to provide an aide to Student as required under Student's individualized education programs (IEPs) for 1998-1999 and 1999-2000, thereby denying Student a free appropriate public education (FAPE), and, if so, the appropriate remedy; and
3. Whether Parent was entitled to reimbursement of tuition and transportation costs incurred in connection with Parent's unilateral placement of Student at a private school.

Hearing Officer Sara J. Vance (the "Hearing Officer") conducted the due process hearing on October 2, 3, 4 and 5, 2000. The Hearing Officer issued her written decision on October 18, 2000. The Hearing Officer found in Student's favor on issues (1) and (2), and in favor of the District on issue (3). Student filed a timely appeal on November 22, 2000.

Parent filed an opening brief with her notice of appeal. Following a telephonic conference with the parties on December 1, 2000, the Administrative Law Judge issued an order permitting the District to file a response brief, and for Parent to file a reply brief. The Administrative Law Judge ordered that the 30-day review period mandated by A.A.C. R7-2-405(21) would commence upon the date of receipt by the Office of Administrative Hearings of Student's reply brief.

The Administrative Law Judge reviewed an extensive record, consisting of four volumes of hearing transcripts containing 1,237 pages, the exhibits admitted into evidence at the hearing (Student's Exhibits 1 through 50 and the District's Exhibits 1 through 16), the Hearing Officer's 50-page Decision and Order ("Hearing Officer's Decision") and Exhibit "A" attached thereto (the Hearing Officer's September 26, 2000 Order Denying the District's Motion to Dismiss and Setting Applicable Statute of Limitations, with attachments), five blue file folders labeled Pleadings I, II, III, IV and V, respectively, that contained various prehearing materials (orders, briefs,

1 correspondence, etc.), and Student's notice of appeal. The Administrative Law Judge
2 also considered the appeal briefs submitted by the parties.¹

3 Based on the review of the record and consideration of the parties' arguments,
4 the Administrative Law Judge makes the following Decision and Order affirming the
5 Hearing Officer's Decision.

6 Standard of Review

7 This is a final administrative hearing appeal. Both federal and state law require
8 that the reviewing official "make an independent decision." 20 U.S.C. § 1415(g); A.A.C.
9 R7-2-405(21)(b)(v). Deference to the administrative findings of the Hearing Officer is
10 given, particularly when, as here, they are carefully constructed and thorough. *Seattle*
11 *School Dist., No. 1 v. B.S.*, 82 F.3d 1493, 1499 (9th Cir. 1996) (citing *Union School Dist.*
12 *v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994). Although such deference is given, this
13 appeals tribunal is not bound by a hearing officer's factual or legal conclusions. To that
14 extent this administrative hearing appeal is a de novo review.

15 **DECISION**

16 Issues on Appeal

17 The Hearing Officer identified the specific due process issues as follows:

- 18 1. "Is District required to pay, and did the District fail to reimburse Parent for,
19 registration fees at a private school for ESY (extended school year)
20 programs for Student for the summer of 1999 and 2000."
- 21 2. "Is District required to provide an aide for Student during class, recess,
22 and lunch under the 1998-1999 IEP and 1999-2000 IEP, (2) Did District
23 fail to provide such an aide during all the time periods required by the
24 respective IEP's, (3) Did such alleged failure deny Student's right to a free
25 appropriate public education (FAPE), and (4) Is Student entitled to
26 compensatory education for any failure to provide FAPE due to failure to
27 provide such aides (including compensatory education for alleged missed

28 ¹ Also included in the record on appeal were 6 audiocassettes, identified on Student's list of exhibits
29 as Exhibits 27 and 34, of IEP meetings held on November 4, 1999 and May 16, 2000. At the hearing,
30 Parent specifically requested that the Hearing Officer listen to the tape of the May 16, 2000 meeting. The

computer time for language acquisition and for social interaction at recess).”

3. “Is Parent entitled to reimbursement of (i) tuition, and (ii) transportation costs, for unilateral placement at a private school, and (2) is Parent entitled to an order for placement at such private school, both issues which will be determined in part by whether Student is receiving FAPE from District under Student’s 1999-2000 IEP, and specifically:

- (a) Whether District failed to provide prior written notices required to be provided under IDEA;
- (b) Whether Student’s placement under Student’s 1999-2000 IEP is appropriate; and
- (c) Whether Student is making meaningful progress under the 1999-2000 IEP (to the extent required for District to provide a FAPE to Student).”

As noted above, the Hearing Officer found in Parent’s/Student’s favor on issues (1) and (2), and against Parent on issue (3).

As to issue (1), the Hearing Officer entered the following Order (“Order No. 1”):

“District shall pay Parent \$500.00 (to reimburse Parent for Registration fees paid by Parent to ESY Private School) on or before October 31, 2000.”

[Hearing Officer’s Decision, page 49]

As to issue (2), the Hearing Officer entered the following Order (“Order No. 2”):

“District shall provide twenty hours of tutoring services to Student. Those tutoring services shall be provided at a time convenient to Parent, and shall be provided in minimum time allotments of no less than one hour. The subject matter of the tutoring shall be at Parent’s discretion, and may include having a tutor assist Student in using software programs provided by parent if a computer to run

Hearing Officer did so, and made several specific findings of fact (Nos. 37 & 38) based on that review. The Administrative Law Judge did not listen to the audiotapes.

1 such programs is reasonably available to District. The total twenty
2 hours shall be provided on or before March 31, 2001. District and
3 Parent may agree to any time schedule for providing such services
4 as are acceptable to both parties.”

5 [Hearing Officer’s Decision, page 49]

6 Neither party took issue with the foregoing Orders. The Administrative Law
7 Judge finds both Orders to be supported by the evidence, and they are hereby affirmed
8 and incorporated herein; *except, however*, that Order No. 1 is modified as follows: the
9 clause “on or before October 31, 2000” is deleted and replaced with “not later than
10 thirty-five (35) days from the date that this Decision and Order is mailed to the parties.”

11 *The Hearing Officer’s Decision*

12 The Administrative Law Judge finds the Hearing Officer’s Decision to be
13 thorough, accurate and complete, and supported by the evidence and the applicable
14 law. Therefore, the Hearing Officer’s Findings of Fact and Conclusions of Law are
15 hereby adopted and incorporated in this Order, with only three modifications, as follows.
16 In Finding of Fact No. 10, fourth line, the word “improvements” is deleted and replaced
17 with “impairments.” On page 37, second full paragraph, and on page 42, first full
18 paragraph, the citation to “20 U.S.C. § 1412(a)(C)(ii)” is deleted and replaced with “20
19 U.S.C. § 1412(a)(10)(C)(ii).”

20 The most significant issue on appeal concerns Parent’s request that she be
21 reimbursed for tuition and transportation costs incurred in connection with Parent’s
22 unilateral placement of Student at a private school. The Hearing Officer’s decision on
23 this issue is affirmed.

24 Parent is not entitled to reimbursement because she failed to meet the
25 applicable legal standard. 20 U.S.C. § 1412(a)(10)(c)(ii), which controls the analysis of
26 Parent’s request, provides as follows:

27 Reimbursement for private school placement. If the parents of a child
28 with a disability, who previously received special education and related
29 services under the authority of a public agency, enroll the child in a private
30 elementary or secondary school without the consent of or referral by the
public agency, a court or a hearing officer may require the agency to
reimburse the parents for the cost of that enrollment if the court or hearing

1 officer finds that the agency had not made a free appropriate public
2 education available to the child in a timely manner prior to that enrollment.

3 As the Hearing Officer concluded, the critical question on this issue was whether
4 the District had made FAPE available to Student in a timely manner before Parent's
5 unilateral placement. On the evidence of record, and as the Hearing Officer found, the
6 answer to that question was "yes." See Hearing Officer's Decision, at 37-46. Thus,
7 Parent was not entitled to reimbursement.²

8 In her reply brief, Parent urges that the Administrative Law Judge should
9 overturn the Hearing Officer's decision based on several federal court decisions
10 including *Board of Education of Montgomery County v. Hunter*, 84 F. Supp. 2d 702 (D.
11 Md. 2000), *Briere v. Fair Haven Grade School District*, 948 F. Supp. 1242 (D. Vt. 1996)
12 and *Rapid City School District 5¼ v. Vahle*, 922 F.2d 476 (8th Cir. 1990). None of these
13 cases are persuasive.

14 In *Hunter*, the issue presented was the proposed placement of a special
15 education student out of a private school and into a public elementary school (*i.e.*, the
16 reverse of the situation posed by the instant case). The court affirmed an
17 Administrative Law Judge's reimbursement order upon a finding that the school district
18 had not provided FAPE to the student. Here, however, the evidence demonstrated that
19 the District had provided FAPE to Student. Therefore, *Hunter* is not instructive in the
20 instant case.

21 *Briere* is also distinguishable on its facts. In *Briere*, contrary to this case, the
22 evidence demonstrated that the IEP at issue was inappropriate for several reasons,
23 including the fact that it had never been fully adopted by the IEP team. See 948 F.
24 Supp. at 41. Thus, the court concluded, it was not reasonably calculated to provide an

25 ² At hearing, and in her appeal briefs, Parent repeatedly urged the appropriateness of Student's
26 current placement in the private school for which Parent seeks tuition and transportation reimbursement.
27 From this base, Parent argued *a priori* that Student's prior placement was not appropriate. While Parent's
28 concern for the well-being of her child is understandable, her argument cannot hold. The fact that
29 Student's current placement is appropriate (as that term is understood in the IDEA context) does not
30 mean that Student's prior placement was not appropriate. Thus, even accepting that Student's current
placement is appropriate (a contention supported by the evidence), it does not follow that the District was
not providing Student FAPE prior to that placement.

1 educational benefit to the student on whose behalf due process had been initiated.
2 Here, however, the evidence demonstrated (and the Hearing Officer found) that the IEP
3 was appropriate. See Hearing Officer's Decision, at 41. Thus, *Briere* is not instructive.

4 In *Vahle*, the court addressed a request for reimbursement for occupational
5 therapy ("OT") services that followed the parents' unilateral removal of their son from
6 the school district's OT program and placement of him in a private OT program. The
7 school district ultimately agreed to fund the private program, but refused retroactive
8 reimbursement. The United States Court of Appeals for the Eighth Circuit held that the
9 student's parents were entitled to reimbursement because the school district had notice
10 of their concerns and was dilatory in dealing with them. 922 F.2d at 478.

11 Parent cites *Vahle* for the proposition that the District failed to adequately
12 respond to her concerns over Student's placement. The Administrative Law Judge
13 finds *Vahle* distinguishable from the instant case for the reason that, as the Hearing
14 Officer found, the District made its position clear to Parent that it did not intend to
15 change Student's placement until it could further evaluate the appropriateness of a self-
16 contained classroom. See Hearing Officer's Decision, at 39. Parent, aware of the
17 District's position, nonetheless elected to move forward with a unilateral placement.
18 Parent was free to make that decision. But, as Parent failed to first establish a denial of
19 FAPE, she did so at her own financial risk.
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ORDER

Based upon the foregoing,

IT IS HEREBY ORDERED that the Hearing Officer's Decision, as modified herein, is **AFFIRMED**.

RIGHT OF JUDICIAL REVIEW

Pursuant to Arizona Administrative Code (A.A.C.) R7-2-405(22), this Decision and Order is the final decision at the administrative level. Any party aggrieved by the findings and decisions made in a hearing or in an appeal review has the right to judicial review. Any action for judicial review must be filed within 35 days of the date that the Decision and Order was mailed to the parties of record.

ORDERED this day, February 5, 2001.

Daniel G. Martin
Administrative Law Judge

Original transmitted by mail this
____ day of _____, 2001, to:

Steven Mishlove, Associate State Director
Arizona Department of Education
ATTN: Theresa Schambach
1535 West Jefferson
Phoenix, AZ 85007

Copy of the foregoing transmitted by certified mail
this ____ day of _____, 2001, to:

Robert D. Haws, Esq.
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Two North Central Avenue
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Copy of the foregoing transmitted by certified mail

1 this ____ day of _____, 2001, to:

2 --- ----, Esq.

3 The ---- Law Offices

4 ----

5 Phoenix, AZ

6 Copy of the foregoing transmitted by mail

7 this ____ day of _____, 2001, to:

8 Sara J. Vance, Hearing Officer

9 14014 North 8th Place

10 Phoenix, AZ 85022

11 By _____